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## Status of Junior Encumbrancers of Realty

By MARTIN GANG and HERMAN F. SELVIN of the Los Angeles Bar

The word "encumbrance" has been defined as "perplexity." It follows that an "encumbrancer" is one in a state of perplexity. Despite the fact that such meaning is said now to be obsolete, some warrant for its revival may be found in the decisions which have attempted to determine rights of junior encumbrancers of realty.

The cases on this subject are numerous, and the general principles are clear. There are, however, unsettled problems, and a certain amount of contradiction. It is the purpose of this paper to summarize, briefly, these general principles and to point out the nature of the problems which may be said to be yet unsettled.

Primarily, this discussion of the statute of junior encumbrancers will concern itself with such encumbrancers as have a lien by way of mortgage. It is necessary, at the outset, then, even at the risk of covering familiar ground, to sketch something of the historical background of this type of security, particularly with reference to the development of the doctrine of redemption.

At common law, a mortgage was an absolute conveyance of title to the mortgagee, subject to a condition of defeasance if the debt secured thereby were paid promptly.<sup>1</sup> Failure to pay strictly on the due day forfeited whatever right the mortgagor may have had to regain the land. Equity, to ameliorate this harsh doctrine, regarded the mortgage as a security only. The mortgagor was considered the real owner of the property, subject to the lien of the mort-

gage. His estate therein was subject to foreclosure. But, at any time before such foreclosure, the mortgagor could pay the debt and free his land of the lien. This right or power is the well known "equity of redemption."

In states where no further rights are given him by statute, the mortgagor's interest is completely divested by the foreclosure proceedings.<sup>2</sup> In California, however, section 701 of the Code of Civil Procedure provides:

"Property sold subject to redemption \* \* \* may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

"1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

"2. A creditor having a lien by judgment or mortgage on the property sold \* \* \* subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are \* \* \* termed redemptioners."

This section is construed, incorrectly perhaps, as has been said,<sup>3</sup> but nevertheless conclusively, to apply to mortgage foreclosures as well as to sales on execution.

On the other hand, what is strictly known as the "equity of redemption" is to be found provided for in sections 2903-5 of the Civil Code. It is here enacted, in effect, that one having an interest in property subject to a lien may redeem therefrom at any time before such right to redeem is foreclosed.<sup>4</sup>

1. 3 Pomeroy, Equity Jurisprudence, (3d. ed.) Sec. 1179 et seq.

2. Id.

3. See *Gross v. Fowler* (1863) 21 Cal. 392, 395, where Chief Justice Field said: "It is very generally conceded by the profession that the decision (*Kent v. Laffan*, *infra*) was based upon an erroneous construction of the statute; but admitting this to be true, it is too late to interfere with it; rights of property of vast value have grown up under this decision which no court is at liberty at

this day to disturb. If a different rule is to be established hereafter it must be by legislative enactment."

*Kent v. Laffan* (1852) 2 Cal. 595, is apparently the first case to construe the statute providing for redemption after a sale under execution as applicable also to sales under foreclosure. That case construed Section 229 of the Practice Act which was similar to the present Cal. Code Civ. Proc. Section 701.

4. Cal. Civ. Code, sec. 2903. "RIGHT TO RE-

Neither this "equity of redemption" nor the statutory right conferred by sections 701 et seq. of the Code of Civil Procedure, is confined to the mortgagor. Junior encumbrancers also have these powers.<sup>5</sup> In order fully to determine the rights and liabilities of all parties interested in the mortgaged premises, such subsequent encumbrancers, if of record, must be joined in the foreclosure action. It seems proper, then, to inquire into their status as affected by such joinder or by the failure to join them.

#### EFFECT OF FAILING TO JOIN JUNIOR ENCUMBRANCERS

It is stated as a general proposition that the rights of a junior encumbrancer are in nowise affected by a decree in a foreclosure action, commenced by the senior mortgagee, to which the junior has not been made a party.<sup>6</sup> He is left, then, with the right to redeem—either as a redemptioner under section 701 of the Code of Civil Procedure, or as one having an interest in the property, under section 2903 of the Civil Code.<sup>7</sup> In other words, he is still clothed with the "equity of redemption,"

and because of the foreclosure sale, he has become further possessed of the "statutory right of redemption."

These two rights, or powers, are by no means co-extensive. In at least two particulars, it becomes of considerable importance to ascertain which power the encumbrancer is seeking to exercise. The first instance in which such differentiation is material arises when a junior lienholder attempts to redeem property from a foreclosure sale after the expiration of one year from the date of sale. The statutory right to redeem is capable of exercise only within this limited period.<sup>8</sup> But no such bounds are fixed for the enforcement of the equitable power.<sup>9</sup> Consequently, one entitled to enforce this latter power may do so if it has not been barred by a decree in an action to which such person was a party. So, even if the statutory period for redemption after sale, announced in Code of Civil Procedure, sec. 701, has expired, the junior lienholder who was not joined in the foreclosure proceeding, may redeem from the sale.<sup>10</sup>

But, if we suppose a situation where the

DEEM, SUBROGATION. Every person having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, in so far as he was bound to make such redemption for their benefit."

Sec. 2904. "RIGHTS OF INFERIOR LIENOR. One who has a lien inferior to another, upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and

2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby."

Sec. 2905. "REDEMPTION FROM LIEN, HOW MADE. Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

It is probably correct to say that in California a mortgagor has no equity of redemption but that he has a right or power of redemption in addition to that given by C.C.P. 701. Strictly, the equity of redemption is had in a jurisdiction where a mortgage conveys the legal title to the mortgagee. The mortgagor then, after default but be-

fore foreclosure, obtains the aid of equity in regaining the legal title. In this sense the trustor of a trust deed in California has an equity of redemption. For the purposes of convenience, however, the additional right of redemption is referred to in this paper as the "equity of redemption."

5. See *infra*, n. 23.

6. *Montgomery v. Tutt* (1858) 11 Cal. 307, 315. Since the adoption of the Codes it has been said that the only limitation on the time within which the "equity of redemption" may be exercised is contained in Cal. Code Civ. Proc. Section 346. *Raynor v. Drew* (1887) 72 Cal. 307, 13 Pac. 782. This Code section reads as follows: "ACTION TO REDEEM MORTGAGE. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." See also, *Collins v. Scott* (1893) 100 Cal. 444, 34 Pac. 1085; *Wadleigh v. Phelps* (1906) 149 Cal. 627, 87 Pac. 93.

7. *Infra*, n. 10.

8. Cal. Code Civ. Proc., sec. 702.

9. *Supra*, n. 6.

10. *Alexander v. Greenwood* (1864) 24 Cal. 505, *Whitney v. Higgins* (1858) 10 Cal. 547, 70 Am. Dec. 748.

inferior encumbrancer seeks to redeem from the sale, at a time when his statutory right is also available to him, it is nevertheless important to fix definitely the nature of the right which is being enforced. The amount which will have to be paid to the purchaser at the foreclosure sale, as a condition precedent to redemption, differs as the "equity" or the "right" is exercised. If it is the former which the encumbrancer is enforcing, assuming that the first mortgagee purchased at the sale, he is required to pay only the amount of the mortgage debt, plus interest and damages for the delay.<sup>11</sup> Should the purchaser at the sale have been one other than the mortgagee, then the redemption price would apparently be the foreclosure sale purchase price, plus interest.<sup>21</sup> But if the redemption is made in the encumbrancer's character as a redemption under Code of Civil Procedure, section 701—he is required to pay, not the legal rate of interest, but interest at the rate of one per cent per month, together with certain other costs.<sup>13</sup> The cases do not seem to have touched upon this point, probably because the equitable redemption has been exercised only after the statutory period had expired.

Co-existent with these powers of redemption is the right of the second mortgagee to foreclose his lien, since such lien has not been cut off by the decree in the first foreclosure proceeding,<sup>14</sup> as it might have been had he been joined. Until the statute of limitations has barred the prior mortgage debt, however, this right is of slight practical importance. For until such period has elapsed the purchaser at the foreclosure is treated as the equitable assignee of the senior mortgage debt and such purchaser could be deprived of the land only upon satis-

faction of his interest therein.<sup>15</sup>

When the statute of limitations has barred the original debt, however, the junior lienholder may foreclose free of the first encumbrancer.<sup>16</sup> As against the encumbrancer not joined, the bringing of the foreclosure action does not toll the running of the statute.

This rule follows from a proposition, long established in this state, that no act of the mortgagor and mortgagee can affect the running of the statute of limitations as against junior encumbrancers. A decision of the Supreme Court in *Lord v. Morris*, handed down in 1861, first announced this doctrine.<sup>17</sup> In that case, the facts were as follows: A executed a note, secured by mortgage, to B. After the statute of limitations had run on the mortgage debt, A's successors executed two mortgages which were later foreclosed. The mortgagor, after the statutory period had elapsed, had renewed the original note. The first mortgagee then instituted action to foreclose his lien. The purchaser at the foreclosure sale under the junior mortgages intervened and pleaded the statute of limitations. On appeal to the Supreme Court it was held that although the renewal of the note continued the personal liability of the maker, it could not affect the "previously acquired liens" of the junior encumbrancers.

On its facts, *Lord v. Morris* might well be confined to a case where the junior liens attached after the statutory period had expired. The language used, however, is broad enough to apply also to the situation where the inferior liens were acquired before the statute had run,<sup>18</sup> and in *California Bank v. Brooks*, the actual holding went to this extent.<sup>19</sup> The weight of authority outside of this state is contra,<sup>20</sup> but

11. Cal. Civ. Code, secs. 2903, 2905.
12. Cal. Civ. Code, sec. 2905, reads: "Redemption from a lien is made by performing or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien, is entitled for delay." It is difficult to see just how this section applies after there has been a foreclosure sale to one not the mortgagee, but since the "equity of redemption" is clearly held to exist after such sale, in the absence of joinder, the construction given in the text is apparently the correct one.
13. Cal. Code Civ. Proc. secs. 702, 703.
14. *Frates v. Sears* (1904) 144 Cal. 246, 77 Pac. 905, see also cases cited *infra*, n. 25.
15. *Carpentier v. Brenham* (1870) 40 Cal. 221.
16. *Frates v. Sears*, *supra*, n. 14.

17. (1861) 18 Cal. 482.
18. 18 Cal. 482, 490: "The mortgagor, after disposing of the mortgaged premises, by deed of sale, loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is, as to the premises, thenceforth a mere stranger. And if instead of selling the premises, he executes a second mortgage upon them, he is equally without power to destroy or impair the efficiency of the lien thus created \* \* \* He cannot at his pleasure affect the interests of other parties \* \* \*"
19. (1899) 126 Cal. 198, 59 Pac. 302.
20. The cases are collected in a note, 48 A.L.R. 833.

the rule is now firmly established here, not only as to a revival of the senior debt, but as to any act which between the original parties would toll the running of the statute.<sup>21</sup>

Still another right which a junior encumbrancer, not joined, has, and one which the dearth of cases would suggest is not frequently exercised, is to intervene in the foreclosure action, set up his interest, and obtain the overplus, if any, on the foreclosure sale.<sup>22</sup> And since this right to the overplus is one of the primary advantages accruing to an inferior mortgagee who is made a party defendant to the proceedings to foreclose the first mortgage, we are led to the next division of this article.

### EFFECT OF JOINING JUNIOR ENCUMBRANCERS

The statement is frequently made that a junior encumbrancer who is joined, is barred and foreclosed of all his rights except that of obtaining the balance of the foreclosure sale moneys after the first mortgagee's claim is satisfied, and the right to redeem from the sale under Code of Civil Procedure, sec. 701.<sup>23</sup> Such statement is not entirely true.

The right to the overplus, of course, is fundamental. Where nothing more than such joinder and an application for the overplus has taken place, the encumbrancer is left with a lien other "than the one upon which the property was sold" and so he may redeem as a redemptioner under section 701 of the Code of Civil Procedure.<sup>24</sup>

But should the inferior lien holder go

a step farther and cross-complain for a foreclosure of his lien, his statutory right of redemption is gone. In this situation, the California court has said that the encumbrancer has no lien "other than the one upon which the property was sold" and so the necessary qualification of a redemptioner, i.e., "one with a lien by way of judgment or mortgage"—is not met.<sup>25</sup> The same result apparently could be reached if the first mortgagee asked that his decree bar and foreclose the lien of the junior mortgagee.

This result is anomalous. Practically the sole method by which a junior encumbrancer can enforce his security in the event that the foreclosure sale proceeds are insufficient to satisfy more than the first mortgage, is by availing himself of his right as a redemptioner. But under the cases he may even be deprived of this right. Anomalous as such conclusions may be, a reasonable interpretation of the statute can lead to no other—since where the second lien is foreclosed, the property is sold to satisfy that lien as well as the first lien. The fact that the proceeds were insufficient to accomplish the objective of the double foreclosure cannot derogate from the logic of the situation.

As a practical matter, then, a junior mortgagee, whose lien is being foreclosed concurrently with that of the senior encumbrancer, should bid up the property at the foreclosure sale to an amount equal to the sum of the respective debts. Should the property be knocked down to him, he is out of pocket only the amount which he

21. *Brandenstein v. Johnston* (1903) 140 Cal. 29, 73 Pac. 744, *Watt v. Wright* (1884) 66 Cal. 202, 5 Pac. 91, *Wood v. Goodfellow* (1872) 43 Cal. 185.

22. Cal. Code Civ. Proc., sec. 3387: "At any time before trial, any person who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding."

No cases are found holding directly that a junior encumbrancer may intervene, under this provision. The section seems clearly to cover such intervention, however. In *Van Winkle v. Stow* (1863) 23 Cal. 457, where the proceeding was in the old County Court to enforce a mechanics' lien, it was held that a mortgagee could not intervene. This decision is not authoritative today, as it proceeded on the ground that to permit such intervention would be to confer a jurisdiction on the County Court which it did not have i.e. jurisdiction to foreclose a mortgage. At the present time both mechanics' lien

and mortgage foreclosure proceedings are brought in the Superior Court.

23. See Cases cited supra, n. 10. Also *McNutt v. Neuvo Land Co.* (1914) 164 Cal. 459, 140 Pac. 6; *Randall v. Duff* (1889) 79 Cal. 115, 20 Pac. 610; *Carpentier v. Brenham* supra n. 15. *Frink v. Murphy* (1862) 21 Cal. 108; *Kirkam v. Dupont* (1860) 14 Cal. 559; *Montgomery v. Tutt*, supra, n. 6; *Wemple v. Yosemite* (1906) 4 Cal. App. 78.

It should be noted here that a junior encumbrancer, not of record at the time the first mortgage foreclosure proceedings are commenced, occupies the same position as though he had been joined. Cal. Code Civ. Proc. sec. 726.

24. See cases cited supra, ns. 10, 23. Also *Ward v. McNaughton* (1872) 43 Cal. 159.

25. *Black v. Gerichten* (1881) 58 Cal. 56, distinguishing *Frink v. Murphy*, supra, n. 23, since in that case the junior mortgagees had not cross-complained for a foreclosure of their lien. See also *Camp v. Land* (1898) 122 Cal. 167, 54 Pac. 839.

would have to pay as a redemptioner—and he obtains the property.<sup>26</sup>

It follows as a natural inference from the above line of cases, that if the inferior lien is not foreclosed, it survives. Otherwise, a junior encumbrancer could not redeem as a redemptioner even where he had not cross-complained for a foreclosure of his lien, or the senior mortgagee had not asked for its foreclosure. Since the lien survives, then the rule of *Frates v. Sears*<sup>27</sup> would seem entirely applicable, and when the statute of limitations had barred the senior mortgage debt, the junior encumbrancer, even though he had been joined, could foreclose his lien against the purchaser at the first foreclosure sale. This result seems harsh, and is perhaps the reason why *Frates v. Sears* is a minority rule decision. Practically the purchaser may protect himself by quieting his title against the junior, before the statute of limitations has barred the original claim.<sup>28</sup>

In one other instance a junior encumbrancer may be able to foreclose his lien by a subsequent action. Thus, if the judgment debtor (i.e., the mortgagor) redeems from the foreclosure sale, the effect of the sale is said to be "terminated" and the mortgagor is restored to his estate.<sup>29</sup> In other words the parties are placed in the position they would have occupied had there been no first mortgage and foreclosure. So, a second mortgagee, even though he was joined in the foreclosure action, may enforce his lien against the mortgagor who redeems.<sup>30</sup> The mortgagor is "restored to his estate," but that estate, if there had been no first encumbrance, would have been the legal title subject to the lien of the second mortgage. The junior encumbrancer then, may maintain an action to

foreclose, once the mortgagor has availed himself of his rights under the redemption statute.

Frequently, however, a mortgagor conveys the land to a third person, against whom the foreclosure is had. Such grantee may redeem from the sale since he is a "successor in interest" of the mortgagor.<sup>31</sup> For the purposes of the redemption statutes, a successor in interest of the mortgagor is classed with the mortgagor. Consequently it would seem clear that when the grantee redeems the effect thereof would also be to "terminate the sale and restore him to his estate." Practically an unbroken line of cases so holds.<sup>32</sup> But one decision of our Supreme Court rendered in 1878, never expressly overruled, announces a result which is contra.<sup>33</sup> It might be urged that this case is now overruled by implication. But since it has not yet been expressly rejected, it may be said to render uncertain the position of a junior encumbrancer in this respect.

The facts of this case, *Simpson v. Castle*,<sup>34</sup> were, briefly: A mortgagee, after foreclosure, bid in the property at the foreclosure sale for an amount less than the amount of his judgment. A deficiency judgment was docketed. Within the statutory period, a successor in interest of the mortgagor redeemed from the sale. It was held that it was unnecessary to a valid redemption that such successor in interest pay off the amount of the deficiency judgment which had become a lien on the mortgagor's land; and further that such judgment did not become a lien on the land which was redeemed. By dictum, the court said that if the mortgagor himself had redeemed, a different result would have been reached. Yet, if the effect of a redemption by a mort-

26. For example: A holds a first mortgage for \$10,000 and B a second mortgage for \$5,000. If A buys in at the foreclosure sale for the amount of his claim, B to redeem would have to pay \$10,000 plus the statutory costs. So, if B bids the property up to \$15,000, his claim for \$5,000 will be set off against the sale price, and the actual cash forthcoming will be \$10,000 plus expenses. Of course, if the price is bid over \$15,000 then B is protected since the overplus is sufficient to pay his claim.

27. *Supra*, n. 14.

28. Cal. Code Civ. Proc. 738.

29. Cal. Code Civ. Proc., sec. 703; *Calkins v. Steinbach* (1884) 66 Cal. 117, 4 Pac. 1103; *Bateman v. Kellogg* (1922) 59 Cal. App.

464, 211 Pac. 46, holding also that since the junior encumbrancer's reversion of title was brought about because of the redemption by the successor in interest, the former should do equity and repay the latter the amount expended in redeeming. Such holding would not seem to be justified by the prior cases.

30. *Id.*

31. Code Civ. Proc., sec. 701.

32. *Phillips v. Hagart* (1896) 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 365; *Calkins v. Steinbach*, *supra*, n. 29; *Bateman v. Kellogg*, *supra*, n. 29; *Wemple v. Yosemite*, *supra*, n. 23.

33. (1878) 52 Cal. 644.

34. *Id.*

gagor or his successor is to "terminate the sale," the effect, in this case, should have been to render the land subject to the judgment lien. Arising as a question *de novo*, the case might be justified because of the failure, in section 703 of the Code of Civil Procedure, to include the words "or his successor in interest" in stating the effect of redemption by the mortgagor. But this omission is found in every pertinent section except 701, and the construction placed thereon by the courts has always been to consider "successor in interest" as included in the term "judgment debtor."<sup>35</sup>

The second class of persons who may redeem, called "redemptioners," consists of "creditors having a lien by judgment or mortgage on the property sold."<sup>36</sup> If one coming within this classification redeems, he is entitled to a sheriff's deed to the premises, if no other redemptioner redeems from him within sixty days.<sup>37</sup> A clear title to the land is thus obtained, subject only to the proviso in the code that the judgment debtor (and, necessarily, his successor in interest) may redeem at any time within one year after the foreclosure sale. Furthermore, a junior encumbrancer, whose "equity" has not been barred because of failure to join him in the proceedings, may enforce his equity by redeeming from the redemptioner.<sup>38</sup> A junior encumbrancer, then, whose "equity" of redemption has been barred, may nevertheless protect himself by redeeming under his statutory right. For another redemptioner to redeem from him, the amount necessary to be paid includes the redemption price, plus certain costs enumerated in the statute, together with any lien prior to that of the creditor seeking to redeem.<sup>39</sup> And if the judgment debtor seeks to redeem from a redemptioner, he must meet the same terms.<sup>40</sup>

It is pertinent to inquire as to the status of junior encumbrancers when the senior encumbrancer is a mortgage with power of sale or a deed of trust. Where the sale is exercised under the power given in a deed of trust the junior encumbrancer is completely barred.<sup>41</sup> He has no statutory right

of redemption.<sup>42</sup> There is some doubt, however, as to whether there is a right of redemption when the sale is made under a power conferred in a mortgage.<sup>43</sup>

In a great many instances the junior encumbrancer is the beneficiary of a trust deed. Does such an encumbrancer redeem as a successor in interest of the mortgagor, or as a redemptioner? Here, too, the cases leave the answer in doubt. There are decisions in the District Court of Appeal placing a trust deed beneficiary in both classes. Thus in 1921, in *Mitchell v. Price*,<sup>44</sup> the court said:

"\* \* \* As such bondholder, he was a creditor of the \* \* \* owner of the property at the time of the foreclosure sale, and accordingly was entitled to a lien upon the property by virtue of the deed of trust as security for the payment of the bonds held by him, and, consequently, was in a position, as a lien creditor, to redeem the property."

While in *Bateman v. Kellogg*,<sup>45</sup> decided in 1922, the same court said:

"That Woodruff could redeem only in the capacity of a 'successor in interest' and not as a 'redemptioner' is manifest \* \* \* Woodruff was not a 'creditor having a lien by judgment or mortgage' \* \* \* a trust deed is not a mortgage and does not create a lien \* \* \*"

However, a decision of the Supreme Court in 1898 apparently is authority for the point that a trust deed beneficiary redeems as a redemptioner.<sup>46</sup> The facts were, briefly: In an action to foreclose a mortgage, the junior trust deed holder was joined. He asked for the application of the overplus to his claim. After foreclosure and sale, the junior encumbrancer brought this action to enforce a redemption of the property sold. The Supreme Court held that the lien of the trust deed had not been merged in the foreclosure judgment, since no foreclosure of such lien had been asked. The junior encumbrancer was permitted to redeem as redemptioner.

In view of the fact that the Supreme Court regards the junior trust deed as a

35. *Bateman v. Kellogg*, supra, n. 29.

36. Cal. Code Civ. Proc., sec. 701.

37. Cal. Code Civ. Proc. sec. 703.

38. Supra, ns. 6, 7.

39. Supra, n. 37.

40. Id.

41. For a complete discussion of this general question, see Kidd, Trust Deeds and Mort-

gages in California (1915) 3 California Law Review, 381. *Penryn Fruit Co. v. Sherman et al.* (1904) 142 Cal. 643, 76 Pac. 484, 100 Am. St. Rep. 150.

42. Id.

43. Id.

44. (1921) 51 Cal. App. 159, 162, 196 Pac. 82.

45. 59 Cal. App. 464, 477.

46. *Camp v. Land*, supra, n. 25.

redemptioner and not as a successor in interest, it may be considered that the contrary view of the District Court of Appeal is of no authority. But since such view of the lower court was announced in a later case, it may well be that the problem is not definitely settled.

### CONCLUSION

The status of an encumbrancer of real property, junior to a mortgage thereon, may be briefly summarized as follows:

1. When not joined as a party defendant to the foreclosure action:
  - a. He retains his "equity of redemption"
  - b. He obtains in addition the statutory right of redemption.
  - c. He may foreclose his lien against the purchaser at the first foreclosure sale, and after the first mortgage debt is barred by the statute of limitations, he forecloses as a prior encumbrancer.
  - d. He may intervene in the foreclosure action and have the overplus applied to his claim.
2. If joined:
  - a. He may have the overplus applied to his claim.
  - b. He may redeem as a redemptioner under Code of Civil Procedure, sec. 701, unless his lien has been expressly cut off by the decree in the first foreclosure action.
  - c. If his lien has not been cut off, he may foreclose upon the same condition as though he had not been joined.
  - d. Even if his lien is cut off, he may foreclose against the mortgagor if the latter redeems; and the same is true if a successor in interest of the mortgagor redeems, unless *Simpson v. Castle* is still to be considered authoritative.
3. If the encumbrancer is junior to a trust deed, or a mortgage with power of sale, a sale under such powers cuts off all his rights—except that there is still some doubt, after a sale under a power in a mortgage, as to the availability of the statutory right of redemption.
4. It is still unsettled whether a beneficiary of a trust deed, junior to a mortgage, redeems as a "successor in interest" or as a "redemptioner."

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## New World Code For Radio

WASHINGTON CONFERENCE STARTS NEW  
ERA IN INTERNATIONAL LAW OF ETHER.

*By W. JEFFERSON DAVIS of the San Diego Bar; Representative of the Comité  
Internationale de la Telegraphic Sans Fil at the Washington Radio Conference.*

At the Washington Radio Conference in November, the United States was for the first time in a position of creative leadership in building a new structure of international law.

America has always been on the receiving end of common, statutory and international law. It has accepted the patterns which have come from the codes of Justinian, through the English common law, and the pronouncements of international law, as first evolved by Grotius.

Now as the metes and bounds of the air are being charted and wave lengths policed and regimented, the United States will do some broadcasting on its own account.

### NECESSITY IS MOTIVE

Economic necessity was the underlying basic motive actuating the call by Washington to the nations of the world to a radio conference this year. Primarily, the scope of the conference was the revision of the 1912 London convention and the extension of international regulation to other services as well as marine.

Representatives of some 50 foreign countries were in attendance. The American delegation included Secretary Herbert Hoover; Admiral W. H. G. Bullard, chairman of the Federal Radio Commission; Wallace H. White, Representative from Maine and author of the federal radio control act of 1927; Maj. Gen. C. McK. Saltzman, chief signal officer of the Army; and Judge Stephen Davis, former solicitor of the Department of Commerce and now a corporation lawyer in New York.

The American Bar Association, which sponsored the radio control law, was also represented. In fact, it may be said that the American delegation turned its big guns of the radio world on the problem of radio communications.

While the American radio experts were sitting at their desks preparing for the Washington conference, the International Radio Congress was in session at Geneva,

and the foreign delegations included many distinguished diplomats who were at Geneva this summer.

### RADIO IS BIG BUSINESS

Radio has become "big business" not only in America, but in other countries. It also has raised international problems and issues demanding solution. Requirements for a world-wide, uniform legal code governing the future commercial development of radio, and for new legal definitions and agreements which will clear international communications of perplexity and confusion, made conference imperative.

Decent behavior and responsibility for international properties was one of the important considerations of the conference. Russia has been accused of tossing Soviet propaganda into her neighbors' backyards. What principle of law will govern the right of any nation to close the air to subversive materials? Taking the problem in its less flagrant aspects, just how far may any nation go in establishing censorship at its air boundaries, and just how far could such censorship be enforced?

Only in one sense can radio broadcasting in Europe today be said to be controlled. The countries have accepted this new medium of communication as an indication of international fellowship, and while the various governments have made no attempt at government control of wave lengths, all possible control is exercised and a strict censorship is maintained to avoid the broadcasting of material by one country which would give offense to other countries.

### ECONOMY IS SOUGHT

The importance of broadcasting in furthering good will between the nations is so obvious that every effort was made at Washington to effect harmonious agreement as soon as possible.

There are some exceptions to this prevalent spirit of cooperation, however, and occasionally one nation throws a "monkey wrench" into the broadcasting machinery.

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For example, during the general strike in England, the only means of disseminating information which existed between the government and the public was the broadcasting station. The most important of these was Deventry, transmitting on 1,600 meters. It was found, however, that the transmissions during the time of the strike were subject to insurmountable interference from another station, which afterward showed itself to be Moscow.

Whether the Russians were interfering deliberately or not is beside the point. The fact remains that one country can entirely spoil the transmissions from one or more stations in a foreign country in Europe if it desires to do so.

Last year news items from Bucharest indicated that the Russian radio broadcasting station at Moscow was broadcasting criticisms of the Rumanian government and was appealing to its Rumanian audience to start a revolution. The war minister of Rumania instructed one of the military radio stations to set up a counter "buzzing" whenever the Soviet station began to broadcast.

### **DELIBERATELY INTERFERED**

In the case of the Deventry incident it

was not known whether the interference from Moscow was international or not. The Bucharest example presents quite the different situation of one government deliberately intruding itself through the medium of radio into the internal workings of another country to the latter's detriment. The necessity for the establishment of international rules and regulations is therefore very evident.

The development of radio in its early stages from ship to shore added a new means of communication, resulting in the saving of life at sea. The wireless S. O. S. call made a vivid impression upon the imagination, and the world was quick to realize what it meant in terms of human life. The radio apparatus became an essential part of every ship's necessary equipment.

Since the London convention of 1912, which followed shortly after radio was first brought into use for practical communication over water, and in fact, within the last six years, the art of broadcasting came into use. Broadcasting is but one form of radio telephony, but like any other startling innovation, it has developed without legal precedent, and completely changed the hab-

its and thoughts of entire nations.

### MILLIONS DEPEND ON RADIO

Countless millions now depend upon radio not only for education and instruction, but for their amusement, entertainment and relaxation. In the opening of the recent transatlantic long distance circuit between London and New York, by which telephone conversation is stepped up over a great gap in space, we have witnessed the most notable achievement in radio telephony for strictly business purposes.

The radio legal problems, therefore, have assumed an international aspect, and it is not enough for nations to content themselves with national laws on the subject. International codes were necessary. That is to say, international principles and rules governing radio had to be drafted by mutual agreement. Former Justice Hughes has succinctly defined international law as the principles and rules adopted by civilized states as binding upon them in their dealings with each other.

With the exception of a few treaties or conventions prior to the Washington Radio Conference there was no international law controlling radio communication, and we had only fundamental general principles upon which to depend. Except for marine use, we did not find in the international field other allocation of wave lengths or other regulatory measures. It was toward the formulation of an international radio code that the Washington conference directed its attention. The London convention of 1912 provided for revision at five-year intervals. The World War destroyed the possibility. Afterward the matter drifted until there was a very decided pressure from European countries for a new conference to revise the London convention and to bring it down to date.

### PROPOSALS ARE COMPILED

The proposals for modifications submitted by the various countries through the Bern bureau were compiled and circulated. These proposals approximate from 1,600 to 1,700, and make a book of 600 or 800 pages.

Obviously the objective of the Washington conference was to take these proposals as submitted and from them compile a new international convention. The main issues of the conference centered around such questions as freedom of the air, transmission of communications, secrecy of communications, transmissions of news and security of human life, questions of commer-

cial and industrial property and intellectual, literary and artistic copyrights.

The problem of broadcasting copyright productions is much more acute in Europe than in the United States, due to the great number of different language countries all within radio speaking and hearing distance of each other. Already specific laws have been passed to protect the author of a literary or musical composition. In Norway, for instance, an author has the right to forbid, with the consent of the ministry of education, the broadcasting of his work, and if it is broadcast by his consent he receives compensation on a yearly basis.

The chief topic of the second annual meeting of the Confederation of Authors and Composers, which met recently at Rome, was the revision of the Bern Convention. The United States is not an adherent to the present Bern Convention, although the American Authors' Society has for years been trying to make us a signatory. It was virtually certain, therefore, before the Washington Radio Conference convened, that the United States would be asked to approve of the Bern Convention as revised.

### AIR MAIL URGED LONG AGO

One hundred years ago a Postmaster General of the United States recommended to Congress that some way be devised to carry the mail through the air, but even 23 years after birth, the air industry had made little progress in the utilization of this field of commerce and was so slow in reaching maturity that its growth seemed permanently stunted.

On the other hand, its air twin, broadcasting, a lusty infant of scarcely more than 6 summers, has displayed such precocity that its voice can be heard nightly from one end of the country to the other, and it has become literally a necessity in all homes, not only in our own country, but abroad as well.

The distinguishing feature about American broadcasting is that its service is free to its audience of listeners. In Great Britain a tax is levied upon receiving sets, and in Europe generally the entire industry is conducted upon the principle of "Let him who receives pay."

The First International Wireless Telegraph Convention was signed at Berlin in 1906, and was the result of joint conferences among representatives of the United States and European countries held in Ber-

lin in 1903 and 1906. Various drafts of conventions were discussed, but without appreciable result.

#### STILL AWAITING AGREEMENT

When the London convention of 1912 was held radio was just beginning to be used as a means of communication over water. Consequently its provisions applied to all radio stations both coastal and on shipboard "open to public service between the coast and vessels at sea." No other forms of radio communication then being used, such systems as broadcasting and point-to-point, radio telegraph are today still open for international agreement.

The American delegates noted a reservation regarding rates, and the convention was ratified by the United States Senate.

The Berlin convention of 1906 is still effective for questions arising between the United States and countries signatory to it, but which have failed to ratify or adhere to the London convention of 1912.

The International Convention on Safety of Life at Sea was signed at London in 1914, providing for radio equipment on vessels, but lacking complete ratification is not binding.

At the Conference on Limitation of Armaments the signatory powers by resolution provided for a commission of jurists. This commission met at The Hague and in 1923 promulgated rules for the control of radio in time of war. The United States indicated its willingness to enter into a treaty embodying the rules as adopted.

#### GENERAL ALLOCATION FAILED

Article 16 of the rules of warfare provides that any aircraft transmitting intelligence while engaged in a flight is deemed to be engaged in hostilities.

The Hague Conventions of 1899 and 1907 deal to some extent with the status of radio stations in time of war, as does the Land War Neutrality Convention.

In 1920 the Washington Conference on Electrical Communications made an unsuccessful attempt to obtain a general allocation of wave lengths throughout the world. Due to difference in time, there has been no interference between European and American transmission. But in that period where government control of wave lengths was ineffective in the United States the piratical seizure by some few American broadcast-

(Continued on Page 27)

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## The President's Page

*Fellow Members,  
Los Angeles Bar Association:*

### DECEMBER MONTHLY MEETING

A most interesting meeting will be held on Thursday evening, December 22nd, at the Chamber of Commerce Banquet Hall, 1151 South Broadway.

Hon. W. T. Craig, attorney for the Board of Trade and one of the leaders of our bar, will deliver an address on the subject of "The New California Arbitration Law."

At this meeting also the Building Committee will submit its report and ask for authority to complete negotiations for the erection of a height limit Bar Association building. We shall have before us such a proposal submitted by the owner of a downtown lot, 110 x 150 feet, said building to be erected without cost to the Association or financial obligation of any kind, and with a possible opportunity for substantial revenue to the Association.

At the meeting I shall also take the liberty of making a statement concerning the attitude of the Association, as I see it, upon certain matters which have been the subject of public discussion.

### ANNUAL ELECTION

At the meeting of the Association on December 22nd, at the Chamber of Commerce Banquet Hall, a nominating committee will be elected to nominate officers who will be balloted for at the succeeding annual election. Since any twenty members may "by petition in writing presented to the Secretary" nominate candidates for any office, the nomination by the committee is not in any manner final. While it is of course assumed that a regularly constituted committee will give the matter of nominations careful and unbiased consideration, having the best interests of the Association at heart, yet under the By-Laws a complete democratic spirit is preserved by allowing any twenty members of the Association to make nominations that are equally as effective in so far as submission to the electorate of the Association is concerned.

### "I DO NOT CHOOSE TO RUN"

While I greatly appreciate the many kindly suggestions that I become a candidate for reelection to the office with which I have been honored by Los Angeles Bar Association, permit me to gratefully set the

matter at rest by saying that I shall not be a candidate.

I am a thorough believer in the spirit of rotation in office. I think we should endeavor to give an opportunity to as many men and women as possible to render service in carrying on the active work of the Association. New personalities bring new life and new zeal. I do not mean by this that those who are untried and inexperienced should be chosen, but there are many men and women in the Association who have gained experience by long service, well fitting them for added responsibilities. The work of our Association has become heavier than most of the members realize. Unless we are willing to sacrifice the spirit of volunteer service which must reflect itself and permeate through the entire organization, the president of the Bar Association must continue to give practically his entire time to the work of the Association during the period of his incumbency. Having done this, I think it is fair to say that he has earned the right to be relieved by some one who may be given the honor and privilege of devoting a year's time in similar service for his profession.

### THANKS TO OUR JUDGES

Much can be accomplished by cordial cooperation between the bench and the bar. At no time has there been a more wholesome understanding between bench and bar than at present. This is evidenced not only by the work of the joint Bench and Bar Committee, of which frequent mention has heretofore been made, but also by the cooperation of the judges in our campaign for new members. I am gratified to say that every one of the twenty-eight members of the Superior Court and every one of the twenty-six members of the Municipal Court, sent out at least fifty personal letters to attorneys who are not members of the Bar Association. This resulted, of course, in more than one letter going to each of such attorneys. In consequence of this cooperation a considerable number of applications has been received. No one realizes more keenly than do the judges on the bench the necessity for a general raising of the standards of the practice of law. Their active and earnest cooperation is most deeply appreciated by the Association.

### INCREASE IN MEMBERSHIP

I am delighted to announce that we have had the greatest increase in membership ever experienced in one year during the history of our organization. In the latter part of February we had 1835 members. At present we have about 2550 members and I am quite sure that we shall exceed 2600 before the membership campaign is finally concluded. A considerable number are waiting until after the first of January to present their applications which will further increase the membership of the Association. I am much indebted to my assistant, Mr. J. L. Elkins, for the very excellent service he has rendered in conducting the innumerable details of this campaign, and to Mr. Thomas K. Case, Chairman of the Membership Committee, and to the three hundred and more members who have actively participated in the membership canvass. I regret that space does not permit an acknowledgement by the publication of all of the names.

I am suggesting to the editors of the BULLETIN that the names of all those actively serving upon committees during this year be included as a feature of the annual number to be published in March.

### DUES

Every once in a while someone who is unfamiliar with the growth of the work of Los Angeles Bar Association questions the amount of the dues and suggests that in view of the incorporation of the state bar dues may be reduced.

The Association is in need of additional secretarial assistance. We have numerous committees whose activities have been retarded because we were unable to furnish them the clerical and secretarial help that the situation demands. The executive personnel should be increased, thus relieving officers and committee chairmen of the Association of the necessity of undue sacrifices of time. For this and other reasons the dues should not be reduced.

I have collected figures from other organizations which indicate that our dues are very modest indeed. For example, the dues of the American Institute of Architects are \$25 per annum. The dues of Los Angeles County Medical Society are \$22 per annum. The dues of Los Angeles Chamber of Commerce are \$25 per annum. Los Angeles Realty Board charges \$50 initiation fee and \$7 per month, or \$84 per annum dues (this

includes \$19 for state and national association dues).

The Association of the Bar of the City of New York has a classified membership paying from \$25 to \$75 per annum as dues. New York County Bar Association charges \$10 and \$15 annual dues.

San Diego Bar Association and Lawyers Institute formerly charged \$18 per annum but have now reduced the dues to \$12 per annum—an amount still in excess of our schedule.

San Francisco Bar Association charges members admitted for not more than five years \$6 per annum; those admitted for more than five years, but not more than ten years, \$12 per annum; those admitted for more than ten years, \$19 per annum—or an average of \$14 per annum.

The problems in a large city are much more complicated and difficult than in a relatively small community and the fact is that the present charge of \$10 per annum is woefully inadequate.

### MR. JOHN E. BIBY

In the last issue of the BULLETIN was printed a statement by Hon. John E. Biby, member of the Board of Bar Examiners. It is well worth reading. Very few members of the bar realize the extremely valuable service that Mr. Biby has rendered our profession during the past nine years—first as Examiner for the State Board and for the last two years or more a member of the State Board of Bar Examiners. The heavy part of the work has fallen upon the shoulders of Mr. Biby for the reason that more applications have been filed in this district than in the North, and Mr. Biby has been compelled during his period of service personally to interview and examine over fifteen hundred applicants for admission to the bar. The office of the Board is in San Francisco and is under the charge of a paid secretary who relieves the Northern members of these onerous duties to a considerable extent. Mr. Biby has been spending more than one-half of his time upon the work of the Board of Bar Examiners. He has done this work quietly, unostentatiously and at great personal sacrifice.

The Bar of California is most deeply indebted to John E. Biby.

KEMPER CAMPBELL.

December 10, 1927

## Doings of the Committees

### OPINIONS BY MEMBERS OF THE BAR ON QUESTIONS OF LEGAL ETHICS

#### 1. JUDGES

Is it improper for a judge to engage in the organization, promotion or financing of a corporation, or to permit his name to be used in connection therewith?

It is improper for a judge to take an active part in the organization or promotion of a corporation whose stock or securities are to be offered for sale to the public, nor should he permit his name to be used in connection with such corporations, or any corporation engaged in active business relations.

Canon 25 of the Canons of Judicial Ethics as adopted by the American Bar Association in 1925 states in part:

"He (a judge) should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute to the success

of private business ventures or to charitable enterprises. He should therefore not enter in such private business or pursue such a course of conduct as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; . . . ."

The dignity of judicial office demands that it be kept free from any possible suspicion of commercialization; use of the prestige of such office as an inducement to persuade others to invest in an enterprise conducted for profit, to further the competitive interests, or to guarantee the respectability of such enterprise necessarily has such a tendency. Therefore, a judge should be scrupulous to see that the fact of his occupancy of judicial position is not used to advance the interests of any corporation or business. This would mean the complete avoidance of the use of his name in connection with any stock selling campaign or in the ordinary commercial activities of a corporation.

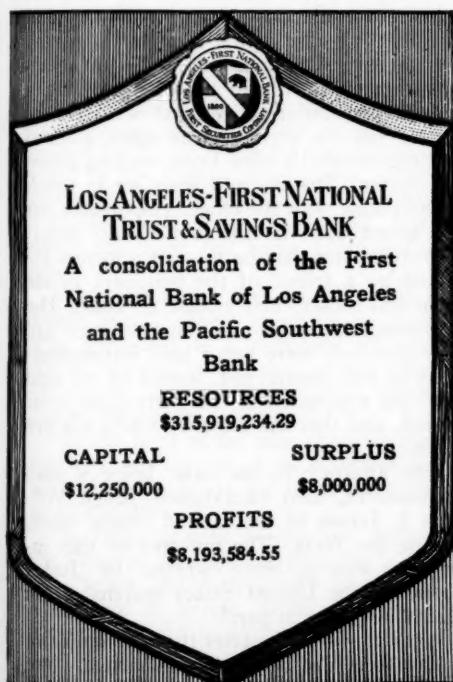
There is no objection to a judge's investing his personal funds in any legitimate property or business, corporate in form or otherwise, so long as his attention to his private affairs does not distract his energies and time to such an extent as to interfere with the proper performance of his judicial duties, nor unless his resultant disqualification, should litigation involving enterprises in which he is interested come before him, would be liable to interfere with the proper administration of justice in his community.

ALBERT W. LEEDS.

#### 2. EMPLOYEES

Is it improper for an attorney who has a considerable number of employees who have not been admitted to the bar to permit them to participate in the annual profits as part of their compensation?

It is not improper for an attorney to permit his employees, not members of the bar, to participate in his annual profits as a part of their compensation, so long as the amounts so paid are not based upon business brought to the attorney by such employees nor based upon services performed by them in particular cases, and finally, provided such participation does not



constitute the main or principal source of their employees' remuneration. The objection to splitting fees with persons not members of the bar is that such practice tends to promote unprofessional solicitation of business; also that it is fundamentally improper for members of the legal profession to divide their emoluments with others who are not members thereof and who do not share its responsibilities. If such practice were allowed it would mean that the client would be impelled to pay for more than

merely professional services. However, the rule should not be extended beyond these limits, and it should not prevent an attorney's compensating those who work for him to some extent in accordance with his prosperity.

ALBERT W. LEEDS.

(Each of the foregoing opinions was approved by the Committee on Legal Ethics, composed of W. Joseph Ford, Chairman, Gurney E. Newlin, John O'Melveny, Theodore T. Hull and John Bibby.)

## HOLDING PRISONERS INCOMMUNICADO

*Report of Sub-Committee of Criminal Law and Procedure Section.*

The Criminal Law and Procedure Section of the Bar Association recently appointed a sub-committee to investigate the practice of holding prisoners incommunicado in the jails and denying them the right of consultation with counsel. The immediate cause of this committee investigation was a letter addressed to the president of the Los Angeles Bar Association by a prominent attorney of this city calling the attention of the president to a specific instance of this practice. The Committee appointed to investigate made a careful inquiry into the matter and obtained documentary evidence in the form of letters and affidavits of all the material facts in the case. The facts as brought out in the committee report may be summarized as follows:

During the month of March of this year the proprietor of a drug store in the city of Los Angeles and one of his clerks were arrested by a squad of officers composed of federal prohibition agents and city police and the prisoners were taken to the office of the Federal Prohibition Administrator for examination. The prisoners not being able to account satisfactorily for certain alcoholic liquors found in the drug store were placed in confinement in the county jail as federal prisoners and a memorandum order was endorsed upon the jail record as follows: "Incommunicado 48 hours. U. S." The next day the wife of the druggist attempted to see her husband at the county jail and was refused admittance by the deputy in charge. She then consulted a well-known attorney in this city requesting him

to interview her husband in the jail with a view to furnishing bail and undertaking his defense. The attorney last mentioned (not the writer of the letter to President Campbell, noted above) made application to the United States marshal for an attorney's pass to interview the prisoners in the county jail and was informed by the deputy in charge of the marshal's office that the men were not in the custody of the marshal and that there was no record of their arrest. On statement of his information that the men had been arrested by a federal prohibition officer and were in the county jail the attorney was again assured that the marshal's office knew nothing about the matter. The attorney then got in touch by telephone with the officer responsible for the arrest and the incommunicado order, informing him that he was an attorney directed by a friend of the prisoners to see them and secure their release on bond. The response of the officer was that the men had been arrested, were being held incommunicado in the county jail, would be so held until the expiration of the forty-eight hour period, and that the attorney could not see them.

The attorney in the case, being a man of resource, then interviewed Judge William J. James of the United States court, stating the facts. The outcome of this interview was a letter written by Judge James to the United States marshal from which we quote in part:

"Mr. ——— states that no complaint has been filed and that the men are not allowed to see an attorney. There is no

authority warranting men being held without the privilege of consulting counsel. Possibly the instruction was given without your knowledge, but as the men are legally in your custody I am sure that you will see that they have access to counsel."

The letter of Judge James was presented by counsel at the office of the United States marshal and it was again stated that the men were not in the custody of the marshal. Later the attorney again called the office of the Federal Prohibition Administrator on the phone and read the above letter of Judge James. He was again assured by the arresting officer that he could not see the prisoners, that they would be held until the expiration of the forty-eight hour period and that if he, the attorney, would present himself at the county jail at that time with a \$5,000 bond for each of the prisoners, said prisoners would be released. These various interviews of defense counsel with the United States marshal and others occurred on a Saturday. Shortly after the last mentioned conversation between the attorney and the arresting officer, action was taken by which a release was issued for the prisoners through the office of the United States commissioner and they were liberated sometime during Saturday afternoon.

As the matter under investigation directly concerns the local office of the United States Bureau of Prohibition a letter was prepared by the investigation committee addressed to the Federal Prohibition Administrator for this district setting forth in detail the facts as above summarized. After reciting the facts the letter concluded as follows:

"This committee does not undertake to vouch for the facts as above set forth. The foregoing is a summary of statements received by us from several different parties, together with certain corroborating evidence.

"If the facts in the case as above summarized are correct, it is manifest that several violations of law were committed in this matter.

"1. Imprisonment of the men without the filing of a complaint charging a public offense and without the issuance of a warrant of arrest, denial to them of the opportunity to furnish bail, and denial of their right to consult counsel.

"Please note authorities as follows:

"Act of Congress of Aug. 18th, 1894—U.S., Comp. Stat. 1678—which conforms the practice on arrest, etc. under federal laws to the practice of the respective states in which the arrest may occur.

"U.S. vs. Dunbar, (C. C. A., 9th Circ.) 83 Fed. 151; Cohen vs. U.S., (C. C. A., 9th Circ.) 214 Fed. 23.

"Rev. Stat. U.S., sec. 1014, in rebail. "Penal Code of California, sec. 849, 145, 825, and 821-2-3-4.

"2. Failure to notify the United States Marshal of the arrest, he being the officer charged in law with the custody of federal prisoners.

"3. A patent attempt to extort a confession from the prisoner under duress of imprisonment.

"4. Assuming the authority to fix bail, which is vested in the committing magistrate, (Penal Code sections supra), and demanding bail which was grossly excessive under the circumstances, such demand being a violation of the provisions of Amendment VIII to the Constitution of the United States.

"It is the policy of the Bar Association to cooperate with all officers in the enforcement of the law, and equally to take such steps as may be necessary to protect the rights of citizens in those cases in which officers, through an excess of zeal, overstep the limits of their authority under the law. This committee will make a report to the Bar Association, stating the facts as we find them to be and making such recommendations as we consider appropriate.

"If the facts in this case, as above outlined, are in any respect inaccurate, or if you have any statement that you wish to submit as to your views of the extent of your authority in such cases, we shall be very glad to hear from you, and will attach your communication to our report as an exhibit."

To this the Committee received a very frank and courteous response over the signature of the Federal Prohibition Administrator, which was personally presented to the chairman of the Committee by the Los Angeles counsel for the United States Bureau of Prohibition. In this letter the Committee were assured that the Committee's inference drawn from statements of the prisoners and others that the order to hold the prisoners incommunicado was an at-

tempt to obtain a confession under duress of imprisonment, was not justified. Otherwise no question was raised as to the facts in the case. It was brought out, however, that the reason why demand was made for such unusually heavy bail was that at the time of the examination of the prisoners information was in the hands of the United States Bureau of Prohibition tending to show that the prisoner druggist had been engaged in illegal traffic in liquors of a far more serious nature than the mere possession and sale. In brief, as it was subsequently stated to the chairman of the Committee, this man was one of the principal sources of distribution of "poison liquor" in Los Angeles. It was further brought out that some time since the Federal Prohibition Administrator had been advised by previous counsel that the existing practice of arresting officers to detain prisoners for such time as might be necessary to complete the investigation of the case and to detain such prisoners incommunicado if there was reasonable cause to apprehend that their release might defeat the purposes of the investigation, was lawful and permissible. As to this the Committee was informed that the view of the law now taken by that officer is that this practice is unlawful, at least in so far as it may interfere with the constitutional right of the prisoner to consult counsel, and that for that reason the practice of ordering prisoners held incommunicado and refusing them the right to consult counsel has been abandoned and will not be used in the future. It was further very forcibly urged that the United States Bureau of Prohibition is endeavoring to the utmost of its powers and with extremely inadequate resources to accomplish an almost impossible task; and that it is the earnest desire and purpose of the government officers charged with the administration of those laws to enforce the law of the land in those matters that are committed to their special charge, and in so doing to conform strictly to the legal authority vested in them.

A point in connection with the matter that is worthy of special note is the peculiar situation of the United States marshal in this case. As pointed out in the letter of Judge James above quoted, the marshal is the officer legally charged with the custody of federal prisoners. According to the well known practice, before an attorney can communicate with a federal prisoner he must

obtain an "attorney's pass" from the marshal. Yet in this instance counsel upon applying for the usual pass, was repeatedly assured by the deputy in charge of the marshal's office, and by Chief Deputy White, that the prisoners were not in the custody of the United States marshal. There is no reason to doubt the entire good faith of the deputies in the statements made by them; and therefore it is apparent that in this instance the arresting officer exercised the power of the marshal to confine a federal prisoner in a case of which the marshal, in fact, was entirely ignorant. This is a thoroughly vicious practice, and should be stopped forthwith. If a writ of habeas corpus had been served on Marshal Sittel requiring him to produce the bodies of the prisoners, who were legally in his custody and of whom he knew nothing, he would have been in a very embarrassing position. It is obvious that this practice if allowed to continue carries with it automatically all the effects of the incommunicado order of which complaint is here made, since the attorney cannot reach the prisoner without the marshal's pass, yet on the face of the proceedings there is no apparent cause for criticism of the marshal when that officer declines to issue a pass over his signature to interview a prisoner who is not known to be in his custody.

In closing their report the Investigating Committee submit the following recommendations, among others:

"In the opinion of your Committee, the practice of holding prisoners incommunicado, at least when such restriction is extended so far as to limit the constitutional right of consultation with counsel, is strictly prohibited by sections 825 and 859 of the Penal Code, as amended in 1927; and that the provisions of the said sections are within the spirit of section 681a of the same code. Due and speedy administration of justice requires not only that prosecuting officers act with promptness, but as well that the defendant should be given every legal facility for the preparation of his defense. Executive officers should be admonished to observe these laws in the letter and the spirit.

"From information received in the course of this investigation, and from common report, your Committee believes that unlawful practices such as were involved in the instant case are not uncommon.

(Continued on Page 27)

# The Political Philosophy of Mr. Chief Justice Taft\*

By REUEL L. OLSON of the Los Angeles Bar

Author of *THE COLORADO RIVER COMPACT*

## II. Due Process and Freedom of Contract B. Due Process of Law

### 3. Limits of administrative discretion.

A case involving the Fourteenth Amendment brought forth comment from the Chief Justice which definitely links that Amendment with the purpose of satisfying a certain sense of fairness. With that as the purpose of the amendment, it becomes essential to inquire into the "sense of fairness" which becomes the basis of action.

A statute of Nebraska affecting all common carriers, imposed on them the duty of considering and settling claims for loss of and damage to freight within sixty days, and provided that if they did not so settle them and in a subsequent suit more was recovered than the amount tendered, the amount found due should carry seven percent interest from the presentation of the claim, as a penalty, and reasonable attorney's fees. If an appeal were taken and the plaintiff succeeded, an additional attorney's fee could be included. It was objected in the present case<sup>18</sup> that certain

costs were imposed on the defeated defendant in the litigation, but not on the defeated plaintiff. It was alleged that this was an inequality, and the question was whether it was a just discrimination and one which the legislature might make and not take the defeated defendant's property without due process or deny it the equal protection of the law. The material in which Mr. Chief Justice Taft's reference to statutes which shock the sense of fairness the Fourteenth Amendment was intended to satisfy, and which therefore cannot be sustained, is included, is as follows:

"The general rule to be gathered from this extended review of the cases, is, that common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries inflicted upon the property of members of the public in their performance; that the reasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's

18. *Chicago & Northwestern Railway Company v. Nye Schneider Fowler Company*, 260 U. S. 35, Nov. 13, 1922.

\*EDITOR'S NOTE: This is the fourth of a series of articles by Dr. Olson on this subject. The outline of the discussion covered in the series is as follows:

## I. Sovereignty and Jurisdiction

### A. Sovereignty

1. Claims of the nation in handling interstate commerce.
2. Jurisdiction over foreign corporations.
3. Two sovereignties coexisting in common territory.
4. Corporation standing in position of government.

### B. Nature of criminal jurisdiction.

1. Theories of criminal jurisdiction.

### C. The Jury System.

1. The jury system in Porto Rico.

## II. Due Process and Freedom of Contract.

### A. The Force of Statutes.

1. May be disregarded by courts.
2. Non-interference of courts with subjects

properly within jurisdiction of other authorities.

### B. Due Process of Law.

1. Elements of judicial controversy.
2. What is not a court.
3. Limits of administrative discretion.
4. Delegation of legislative power.
5. Function of administrative board as agency for marshalling public opinion.

### C. Freedom of Contract and the Police Power.

1. Service Letter Act of Missouri.
2. District of Columbia Minimum Wage Act.

### D. Methods of Dealing with Picketing.

1. One representative for each point of ingress and egress.
2. Requests to withhold patronage.

Conclusion.

fees. But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and 'violate the rudiments of fair play' (Chicago, Milwaukee & St. Paul Ry. Co. v. Polt, 232 U.S. 165) insisted on in the Fourteenth Amendment, will be held to infringe it. \* \* \*

"It is obvious that it is not practical to draw a line of distinction between these cases based on a difference of particular limitations in the statute and the different facts in particular cases. The court has not intended to establish one, but only to follow the general rule that when, in their actual operation in the cases before it, such statutes work an arbitrary, unequal and oppressive result for the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect of state legislation, they will not be sustained.

"\* \* \* The amount of the attorney's fee, \$200 for a case involving the preparation for trial of 72 different claims and a four days' trial, does not shock one's sense of fairness."<sup>19</sup>

It is a hopeful sign when judges thus frankly state the nature of the judicial process. Knowing that we must rely to a certain extent upon a sense of fairness exercised by the judge both laymen and judges will be more likely to control their actions accordingly. Judges will realize that they work with the views and conceptions which are drawn from their sphere of culture, and the sense of fairness will come in as a corrective factor. To determine the correct limits of this sense of fairness would require an entire political philosophy. That its existence is recognized by Mr. Taft is significant.

*Smetanka v. First Trust and Savings Bank*<sup>20</sup> involved the validity of a ruling of Deputy Commissioner of Internal Revenue Speer made Feb. 9, 1915, and a holding of the Commissioner of Internal Revenue. The case shows the limits beyond which an administrative officer may not go.

The particular question was whether, under the Income Tax Law of 1913, income held and accumulated by a trustee for the

benefit of unborn and unascertained persons, was taxable. Mr. Chief Justice Taft wrote:

"\* \* \* There was indicated in the taxing paragraph A the congressional intention to tax citizens everywhere, and noncitizens, resident in the United States, including persons natural and corporate, on income from every source, less allowed deductions. But nowhere were words used which can be stretched to include unborn beneficiaries for whom income may be accumulating. It may be that Congress had a general intention to tax all incomes, whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise, the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication."<sup>21</sup>

With the law in this condition a ruling was made by Deputy Commissioner Speer, Feb. 9, 1915, to the effect that the income tax could be levied only on such income as is payable to some natural or artificial person subject to the provisions of the law. Subsequently this ruling was changed, and the Commissioner of Internal Revenue held that when the beneficiary is not in esse and the income of the estate is retained by the fiduciary, such income will not be taxable to the estate as for an individual, and the fiduciary will pay the tax, both normal and additional. Mr. Chief Justice Taft considered this an addition to the statute and improper to be made by the Commissioner.

"This seems to us to graft something on the statute that is not there. It is an amendment, and not a construction, and such an amendment was made in subsequent income tax laws, as we shall see.

\* \* \* \* \*

"The Act of September 8, 1916 (39 Stat. at Large 757, chap. 463) specifically declared that the income accumulated in trust for the benefit of unborn or unascertained persons should be taxed and assessed to the trustee. It is obvious that, in the acts subsequent to that of 1913, Congress sought to make specific provision for the *casus omissus* in the earlier act."<sup>22</sup>

19. 260 U. S. 35, 43-45.

20. 257 U. S. 602, Feb. 27, 1922.

21. *Idem*, p. 605, 606.

22. 257 U. S. 602, pp. 606, 607.

The limits upon administrative discretion are also indicated by the Chief Justice in the case of *Freund v. United States*.<sup>23</sup> This was a suit against the Government to recover \$34,012.90 as the unpaid remainder of an amount earned by sixteen months' service in carrying the mails by wagons in the City of St. Louis.

"It is, of course, wise and necessary that government agents in binding their principal in contracts for construction or service should make provision for alterations in the plans, or changes in the service, within the four corners of the contract, and thus avoid the presentation of unreasonable claims for extras. This court has recognized that necessity and enforced various provisions to which it has given rise. But sometimes such contract provisions have been interpreted and enforced by executive officials as if they enabled those officers to remould the contract at will. The temptation of the bureau to adopt such clauses arises out of the fact that they avoid the necessity of labor, foresight and care in definitely drafting the contract, and reserve power in the bureau. This does not make for justice; it promotes the possibility of official favoritism as between contractors, and results in enlarged expenditures, because it increases the prices which contractors, in view of the added risk, incorporate in their bids for government contracts. These considerations, especially the first, have made this Court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application so what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into. These observations are justified and illustrated by decisions of this Court in *United States v. Utah, Nevada and California State Co.*, 199 U.S. 414 and *Hunt v. United States*, 257 U.S. 125."<sup>24</sup>

The discretion of administrative officers in the office of the commissioner of Indian Affairs is defined in the case of *Work v. Mosier*.<sup>25</sup> Certain money due minor children of the Osage Indians of Oklahoma was withheld by the Secretary of the Interior in exercise of what he declared to

be a just discretion. The amount to be paid to the parents was limited in advance to a certain monthly rate, and it was declared that no use of the funds would be permitted which did no inure to the separate benefit of the minor. Concerning this procedure, the Chief Justice said:

"\* \* However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary. Congress has since met the need by an amendment to the Act of 1906 by the Act of March 3, 1921, 41 Stat. 1249.

"The direction to the Secretary to pay to the parents the income due the minors is clear and positive. It is that the income 'shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years.' The proviso 'That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment' did not confer on him a power to determine in advance by general limitation a monthly rate in excess of which was due minors should not be paid to parents, nor did it enable him to require before payment a showing that the income beyond such limited rate was being used for the specific benefit of each child."<sup>26</sup>

These three cases show that the general principle which the Chief Justice has followed in determining the proper boundaries of administrative discretion is that of protection to the interests secured by statute. Nothing which the administrative officer can do is to be allowed to affect the statute in the sense of adding something to it; specific provisions of statutes cannot be ignored; and contracts cannot be remoulded. These acts would be beyond the proper scope of administrative discretion.

The principle has been asserted by Mr. Chief Justice Taft that the maxim that a legislature may not delegate legislative power, is subject to qualifications. In other words, our three-fold division of government is at best but a working basis for accomplishing the ends for which government exists. In *Wichita Railroad & Light Company v. Public Utilities Commission of Kansas et al.*,<sup>27</sup> the Public Utility Law of

23. 260 U. S. 60, Nov. 13, 1922.

24. 260 U. S. 60, 62, 63.

25. 261 U. S. 352, Mar. 19, 1923.

26. *Idem*, p. 360.

27. 260 U. S. 48, Nov. 13, 1922.

Kansas, c. 238 of the Session Laws of 1911, created a commission and made full provision for its procedure and powers. The power to fix and order substituted new rates for existing rates was expressly made to depend on the condition that after full hearing and investigation the Commission should find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. Mr. Chief Justice Taft concluded that valid order of the Commission under the act should contain a finding of fact after hearing and investigation, upon which the order was founded, and that for lack of such finding the order in this case was void. He continued:

"This conclusion accords with the construction put upon similar statutes in other States. Public Utilities Commission v. Springfield Gas and Electric Co., 291 Ill. 209; Public Utilities Commission v. Baltimore and Ohio Southwestern R. R. Co., 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."<sup>28</sup>

Besides containing the statement that the maxim that a legislature may not delegate legislative power has some qualifications, the preceding paragraph is significant because of the phrases, "pure delegation", and "substantial compliance." These suggest that there are delegations of legislative

power which are not pure delegations, and others which are not of this nature, and that administrative boards may comply in varying degrees with the procedure and rules enjoined upon them, and that one degree of compliance is "substantial" compliance. We are thus thrown back upon an interpretation of the meaning of "substantial," and it is here that the judge's sense of fairness comes into play. By the language which he uses, the Chief Justice shows that he recognizes the real nature of our alleged separation of powers—that it is a guiding principle and not an iron-clad rule.

That administrative boards may perform the function of an agency for marshalling public opinion relative to some issue in our national life, is the effect of the decision of the Chief Justice in the case of Pennsylvania Railroad Company v. United States Railroad Labor Board.<sup>29</sup> In order to adjust certain differences, representatives of employees met with representatives of the Pennsylvania Railroad Company subsequent to the passing of the Transportation Act of Feb. 28, 1920. The representatives of the employees were the officers of the Federal Shop Crafts of the Pennsylvania System, a labor union of employees of that system, engaged in shop work, and affiliated with the American Federation of Labor. The Pennsylvania representatives refused to confer with the officers of this labor organization for lack of proof that this organization represented a majority of the employees of the Pennsylvania System in the crafts concerned. The Pennsylvania representatives said that they would send out a form of ballot to their employees, asking them to designate thereon their representatives.

Prior to this, the Railroad Labor Board, in one of its decisions, had made a statement of principles or rules of decision which it intended to follow in consideration and settlement of disputes between the carriers and employees. The only two here important are included in paragraphs five and fifteen as follows:

"5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

"15. The majority of any craft or class

28. 260 U. S. 48, 58, 59.

29. 261 U. S. 72, Feb. 19, 1923.

of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."<sup>30</sup>

The labor organization officers, representatives seeking a conference with the Pennsylvania representatives, objected to the ballot which the latter proposed to send out, because it was not in accordance with principles five and fifteen of the Railroad Labor Board in that it made no provision for representation of employees by an organization, but specified that those selected

must be natural persons and such only as were employees of the Pennsylvania Company, and also because it required that the representatives of the employees should be selected regionally rather than from the whole system.

The Company and the labor organization each sent out ballots.

At a hearing before the Board it was held that neither the ballots sent out by the Company or the ballots sent out by the labor organization were proper, that representatives so chosen were not proper representatives, and that rules and working conditions agreed upon by them would be void. The Board ordered a new election for which rules were prescribed and a form of ballot specified on which labor organizations as well as individuals could be voted for as representatives at the option of the employee.

30. Decisions of Railroad Labor Board, No. 119.

(To be Continued)

## NEW WORLD CODE FOR RADIO

(Continued from Page 15)

ing stations of channels set aside by agreement for Canadian use caused interference and made necessary the early adoption of some immediate agreement.

In Europe, however, most of the broadcasting stations have a far greater range than the area of the country in which they are located, and equitable broadcasting agreements are imperative.

The International Radio Congress at Gen-

eva this summer did much to focus attention upon the consideration of questions which were offered for solution at the Washington Radio Conference. Substantial agreement had been reached on many of the most important and underlying principles. The Washington conference amplified more explicitly these basic statements. Representatives of participating nations are now laying the conclusions of the Conference before their respective governments for incorporation into a new international convention.

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## HOLDING PRISONERS INCOMMUNICADO

(Continued from Page 22)

mon, and constitute a serious menace to public liberty. This is a matter that should receive the attention of the Bar Association.

"Inasmuch as the excuse of the United States marshal for refusing an attorney's pass, and also ignoring the admonition of Judge James in regard to the matter, was that the prisoner was not in his custody so far as he knew, it is apparent that a very loose system prevailed, which en-

abled the arresting officer to place a federal prisoner in the county jail without the knowledge of the officer charged with the legal custody of the prisoner. It is recommended that the Bar Association encourage attorneys to report to the Association any instances of a similar nature, to the end that sufficient data may be obtained upon which to base effective action with regard to it in case this improper practice is continued; and it is further recommended that the jailors of all prisons, and all arresting officers, be required in all cases, as soon as a prisoner is booked, to forthwith notify the officer legally charged with his custody."

## Book Reviews

By HARRY GRAHAM BALTER of the Los Angeles Bar  
Lecturer in Law at the College of Law, Southwestern University

ESTATE OF GEORGE WASHINGTON, DECEASED. Eugene E. Prussing; 1927, XII and 512 pages; Little, Brown & Co., Boston, 1927.

Let me first assure every lawyer that his practice will probably not be affected one way or the other whether he reads this book or not, nor is this book a sine que non to any lawyer.

But the *Estate of George Washington* is mighty interesting and should be welcomed to the increasing fold of non-technical legal works.

More than one thousand books have been written about George Washington — no secret of his life has been safely tucked away from zealous searchers. Even Washington's clandestine amourettes are no longer the hidden secrets of the principal participants. But it remained for the enterprising Mr. Prussing—already recognized as an authority on Washington's life and work—to reveal to us the history of Washington's family and effects after his death.

No doubt the author undertook this work as a result of his study of Washington's Last Will and Testament. It is really a very interesting document, revealing the beliefs and desires of a very interesting man.

Even as early as 1668, when an ambitious young man bared to the world his plans to publish an exact copy of the will of Washington, and the schedules which accompanied it, Charles Sumner wrote the comment:

"The will of Washington is a remarkable document, exhibiting his character as proprietor and *pater-familias* and also revealing his best sentiments. Here will be found the emancipation of the slaves and that other testimony, when bequeathing his swords, he enjoined they should 'never be raised except for defense, or in defense of country or its rights.'"

It would do our plutocrats a great deal of good to read how the richest man in the land of those times disposed of his holdings. Even to the learned lawyer who deals exclusively in probate matters, the will of George Washington presents interesting and

helpful reading. The will is 42 pages long and a period of 52 years elapsed before the estate was finally settled. Yet at no time was any litigation attempted to fix its meaning, or to carry out its purposes. Wherever circumstances raised a question, it was promptly settled by agreement. Washington himself took care of this by providing that all possible controversies relating to the estate should be submitted to "three impartial and intelligent men, known for their probity and good understanding," who "shall, unfettered by law or legal construction, declare their sense of the testator's intention \* \* \* \* and such decision is to all intents and purposes to be as binding on the parties as if it had been given in the Supreme Court of the United States."

This is probably one of the earliest examples on record of a provision in a will for arbitration of differences arising during its execution.

Washington anticipated the modern trust company by over 50 years in appointing a group of seven persons as executors of the will. The wisdom of this co-operative plan was signally demonstrated by the fact that not a single purpose dependent on the executors failed of fulfillment.

The work goes into great detail and reveals to the reader a mass of data heretofore unknown. The history of the ultimate disposition of every parcel of Washington's property is given. The Appendix contains interesting material in the form of the last wills of Martha Washington of Mount Vernon, of G. W. P. Curtiss, of Mary C. Lee and of Robert E. Lee.

"It seems to the writer that a new study of the character and career of Washington is in order. It should begin and proceed to the end from a new point of view. Washington never meant to be either a great soldier or a statesman. After his experience in the field, he hated war and he also disliked executive office; yet for sixteen years he sat in the Legislature and in Congress to aid his state and country. He never cared for either power or glory.

"He preferred to devote his capacity to surveying, farming and business, to road-

and canal building, land exploration and settlement and to be a man of affairs. His constantly enlarging career in this constructive work made him in turn a legislator, a landholder and commander in chief, the greatest promoter of the Constitution and President of the United States. Yet he wanted no history of himself written except as a member of the community. He was a good, successful and great citizen because he was unselfish, loved his fellowman, desired justice, lived, worked and labored constantly to leave the world better than he found it.

He was a genius for enterprise and his glory was that it was always based on sound moral principles. \* \* \* \*

"Some day it is hoped a definitive story of his life will thus be written. If here anything substantial has been contributed to that end, the best hope of the writer has been fulfilled." (pages 372-3.)

How strange that after one thousand different volumes have been written about our first President, it is almost as true today as it was more than thirty-five years ago when Mr. McMaster stated that "George Washington is an unknown man."

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